IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 12, 2003

WILLIAM D. BUFORD v. STATE OF TENNESSEE

Appeal from the Criminal Court for Williamson County
No. 1101-333 Timothy L. Easter, Judge

No. M2002-02180-CCA-R3-PC - Filed April 24, 2003

The petitioner, William D. Buford, appeals the trial court's denial of his petition for post-conviction DNA testing. See Tenn. Code Ann. §§ 40-30-403, -404 (Supp. 2002). The issues presented for review are whether the trial court erred by its refusal to permit DNA (deoxyribonucleic acid) testing and by its refusal to substitute counsel based upon the petitioner's dissatisfaction with the performance of his appointed counsel. The judgment of dismissal is affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which JOSEPH M. TIPTON and THOMAS T. WOODALL, JJ., joined.

William D. Buford, Nashville, Tennessee (on appeal), pro se, and Eugene Honea, Assistant District Public Defender (at trial), for the appellant, William D. Buford.

Michael E. Moore, Solicitor General; David H. Findley, Assistant Attorney General; and Derek K. Smith, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In 1982, the petitioner and a co-defendant, Danny King, were convicted of aggravated rape and aggravated kidnapping. The trial court imposed concurrent life sentences. The facts underlying the convictions have been summarized as follows:

> In the early evening of November 2, 1981, two men abducted the victim from the parking lot of a Franklin shopping center. They drove to a nearby road, raped her, and then tossed her out of their car. Within a brief time, the victim sought help at a nearby service station, the police were alerted, and she was taken to a hospital for treatment and examination. The [petitioner and his co-defendant] were arrested within a few hours.

> Two witnesses, present in the parking lot, testified that they heard the victim's screams, followed the defendants' car, and reported the license number and description of the car to the authorities. . . . A number of officers testified about details of the investigation and the custody of the defendants' car, the victim's purse, her jewelry found in the car, and in the defendants' pockets, and other evidence. Testimony from a serologist and the treating physician confirmed that the victim had suffered abrasions about her body, that live spermatozoa were found in the medical examination, and the defendants' clothing bore blood stains. The victim testified and identified [the petitioner and his co-defendant] as her assailants.

State v. William D. Buford and Danny R. King, No. 83-113-III, slip op. at 1-2 (Tenn. Crim. App., at Nashville, Feb. 29, 1984). At trial, co-defendant Danny King offered no defense. Id., slip op. at 2. The petitioner insisted that the victim had consented to sex. Id.

On direct appeal of the convictions, this court affirmed. Id. An important issue on direct appeal was the state's failure to notify the petitioner and his co-defendant of the results of scientific tests conducted on one of two glass slides containing spermatozoa. Both slides were prepared during a gynecological examination of the victim. This court held that any error on the part of the state would have had a "de minimus" effect on the trial because "absolutely no suggestion was made that the two smears were linked to two persons, or to any person for that matter." Id., slip op. at 2. On April 30, 1984, our supreme court denied permission to appeal.

In 1989, the petitioner filed a petition for post-conviction relief, which was denied. This court affirmed the denial, concluding that the petitioner had not been denied the effective assistance of counsel. William David Buford v. State, No. 01C01-9202-CC-00052 (Tenn. Crim. App., at Nashville, July 17, 1992). Our supreme court denied permission to appeal on October 26, 1999.

On October 18, 2001, the petitioner filed this petition pursuant to the Post-Conviction DNA Analysis Act of 2001, requesting "that all human biological evidence in possession or control of the prosecution, law enforcement, laboratory, or court . . . be held for DNA analysis." See Tenn. Code Ann. § 40-30-403. The petitioner asserted that a DNA analysis of the slides' contents would establish his innocence. The trial court appointed counsel and the state, in its response to the petition, answered that neither the clerks of court, the TBI Crime Laboratory, the Franklin Police Department, nor the Williamson County Sheriff's Department possessed any human biological evidence from the petitioner's case which might be subjected to DNA analysis. At the time of the original answer, however, the state had not received a determination from the clerk of this court as to the existence of any evidence which might be submitted for testing.

Later, the petitioner filed a pro se motion seeking to terminate his appointed counsel. He claimed that his counsel had failed to communicate at all until the filing of a complaint with the Board of Professional Responsibility and, thereafter, had communicated with the petitioner only once, expressing the view that the state had correctly determined that there was no evidence available for DNA testing. The petitioner also asserted that the representative of the TBI Crime Laboratory

had been untruthful when he claimed that all evidence, except the co-defendant's automobile, had been returned to the Franklin Police Department. The petitioner argued that the affidavits filed in the response by the state were not conclusive and did not afford him the opportunity of cross-examination. Finally, the petitioner complained that because the state may have lost some of the evidence, he was entitled to relief under State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999). The trial court dismissed the petition without an evidentiary hearing and without appointing substitute counsel. There were no findings of fact.

In this appeal, the petitioner argues that the trial court erred by summarily dismissing the petition and by failing to substitute counsel. In response, the state contends that because there was no longer any specimen to test, the trial court properly relied upon the affidavits. It submits that because the petitioner claimed at trial that the victim had consented to the sexual acts, he had effectively acknowledged sexual contact and there was no reasonable probability that DNA analysis would have produced a more favorable result. The state also contends that because there were eyewitnesses to the abduction who followed the petitioner and his co-defendant and obtained their license plate number, innocence was improbable.

The Post-Conviction DNA Analysis Act of 2001 provides as follows:

> [A] person convicted of and sentenced for the commission of first degree murder, second degree murder, aggravated rape, rape, aggravated sexual battery or rape of a child, the attempted commission of any of these offenses, any lesser included offense of these offenses, or, at the discretion of the trial judge, any other offense, may at any time, file a petition requesting the forensic DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence.

Tenn. Code Ann. § 40-30-403. There is no statute of limitation. Id. By the terms of the Act, trial courts, after affording the prosecution the opportunity to respond, are obligated to order DNA analysis when the petitioner satisfies the following conditions:

(1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;
(2) the evidence is still in existence and in such a condition that DNA analysis may be conducted;
(3) the evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
(4) the application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Tenn. Code Ann. § 40-30-404. Although our statute does not explicitly require that the petitioner show that identity was an issue, similar statutes in other states do. See, e.g., 725 Ill. Comp. Stat. Ann. 5/116-3(b)(1) ("The defendant must present a prima facie case that . . . identity was the issue in the trial[.]"); Tex. Code Crim. Pro. art. 64.03(a)(1)(B) ("A convicting court may order forensic DNA testing under this chapter only if the court finds that . . . identity was or is an issue in the case[.]"). Further, Tennessee Code Annotated section 40-30-405 provides that if DNA analysis would have produced a more favorable verdict or a more favorable sentence, trial courts "may" order DNA analysis when the petitioner satisfies the same conditions.

This case presents issues of first impression, at least in this jurisdiction. Although several states have enacted statutes authorizing DNA analysis after the judgment of conviction becomes final, there are few reported cases on the subject. The propriety of the summary dismissal in this instance depends primarily upon the construction of the new act. The Tennessee act does not specifically provide for a hearing as to the qualifying criteria and, in fact, authorizes a hearing only after DNA analysis produces a favorable result. See Tenn. Code Ann. § 40-30-412.

The cardinal rule of statutory construction is to effectuate legislative intent; all rules of interpretation are to that end. Browder v. Morris, 975 S.W.2d 308, 311 (Tenn. 1998); Davenport v. Chrysler Credit Corp., 818 S.W.2d 23, 27 (Tenn. Ct. App. 1991). The meaning of a statute is to be determined not from specific words in a single sentence or section but from the act in its entirety in light of the general purpose of the legislation; any interpretations should express the intent and purpose of the legislation. National Gas Distrib., Inc. v. State, 804 S.W.2d 66, 67 (Tenn. 1991); Loftin v. Langsdon, 813 S.W.2d 475, 478-79 (Tenn. Ct. App. 1991). Statutes are to be construed with reference to pre-existing law and do not change it further than the express terms or the necessary implications. Harman v. Moore's Quality Snack Foods, Inc., 815 S.W.2d 519, 523 (Tenn. Ct. App. 1991).

From our research, it appears that there are only two appellate cases in this state construing the terms of the 2001 act. Arizona, Arkansas, California, Delaware, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Texas, and Utah have adopted post-conviction DNA analysis statutes. Of those, only California, see Cal. Pen. Code § 1405, and Missouri, see Mo. Rev. Stat. § 547.035, expressly provide for a hearing prior to the ordering of DNA testing. A discretionary hearing is permitted in Florida, see Fla. Stat. ch 925.11(2)(d), Nebraska, see Neb. Rev. Stat. § 29-4120, New Jersey, see N.J. Stat. Ann. § 2A:84A-32a, and Wisconsin, see Wis. Stat. § 974.07. In Oklahoma, the statute establishes a program within the Oklahoma Indigent Defense System to provide testing, see Okla. Stat. tit. 22, §1371.1, and in Washington, the request for post-conviction DNA testing must be made to the county prosecutor, see Wash. Rev. Code § 10.73.170.

In the first case interpreting our act, Shaun Lamont Hereford v. State, No. E2002-01222-CCA-R3-PC (Tenn. Crim. App., at Knoxville, Nov. 13, 2002), the trial court summarily denied post-conviction DNA analysis, concluding that the petitioner had failed to state any factual basis for his

claim. In Hereford, the petitioner was convicted of burglary and theft, both of which are offenses for which the trial court "may" order post-conviction testing. See Tenn. Code Ann. § 40-30-403. The trial court specifically found that because many of Hereford's convictions were based upon guilty pleas and stipulated facts, no relief was warranted. This court determined that the trial court, under these circumstances, did not abuse the discretionary authority granted by the statute. Id. No application for permission to appeal to our supreme court was filed.

This case differs from Hereford in that one of the petitioner's offenses, aggravated rape, is among those crimes for which the trial court must order analysis if the petitioner satisfies the statutory prerequisites. The petitioner's conviction for aggravated kidnapping would fall within the class of crimes for which testing is discretionary. Further, neither conviction was the result of a guilty plea or was based upon stipulated facts, as was the case in Hereford.

While other cases pertaining to the 2001 act are now under consideration, Reginol L. Waters v. State, No. M2002-01712-CCA-R3-CO (Tenn. Crim. App., at Nashville, Mar. 14, 2003), is the only other opinion to have been filed. In Waters, this court ruled that a pending direct appeal of a conviction did not preclude a simultaneous petition for a DNA analysis.

Because of the relative newness of legislation permitting DNA analysis as a method of post-conviction relief, there are few reported cases from other jurisdictions. In People v. Stevens, 733 N.E.2d 1283, 1285-86 (Ill. App. Ct. 2000), appeal denied, 755 N.E.2d 482 (Ill. 2001), the Illinois Court of Appeals held that if the trial court finds that the petitioner has established the statutory prerequisites, it must order testing. The court ruled that if the prerequisites had not been met, summary dismissal was appropriate. Like the Tennessee statute, the Illinois statute does not contain a provision requiring an evidentiary hearing. See 725 Ill. Comp. Stat. Ann. 5/116-3. In Zollman v. State, 820 So.2d 1059 (Fla. Dist. Ct. App. 2002), the appellate court determined that the trial court had erred in summarily dismissing a petition for post-conviction DNA testing of rape kit evidence where the petitioner had established that DNA analysis was unavailable at the time of his trial and conviction, that identity was an issue, and that DNA analysis could possibly exonerate him. The court remanded the case for further proceedings. Florida's statute provides that the trial court may enter an order on the merits of the petition or may set the petition for hearing. See Fla. Stat. ch. 925.11(2)(d).

There are a number of unreported cases from trial courts interpreting the acts in other states. In State v. Daniel Donovan, No. CR-94-393, 2002 Me. Super. LEXIS 242 (Me. Super. Ct. Nov. 20, 2002), the court, while acknowledging the dearth of case law nationally on post-conviction DNA testing, determined that the petition must establish "prima facie evidence" of the statutory requirements before relief will be considered. See Me. Rev. Stat. Tit. 15, § 2138. The Delaware Superior Court denied a request for DNA analysis after convictions for several sex-related offenses where DNA analysis of human sperm cells on a comforter had been conducted prior to trial and the results were deemed inconclusive. State v. John A. Woods, No. 951101975, 2002 Del. Super. LEXIS 513 (Del. Super. Ct. Dec. 20, 2002). Although the petitioner asserted that a different type of test might produce favorable results, the court ruled that the petitioner had failed to establish that

identity was an issue, a requirement under that state's statute. Id. It does not appear that there was an evidentiary hearing.

The statute adopted in Texas is very similar to Tennessee's. Unlike the Tennessee act, the Texas statute requires the appointment of counsel for indigent defendants, contemplates a hearing as to whether the results of DNA analysis are favorable to the petitioner, and makes no distinction among the qualifying crimes. See Tex. Code Crim. Proc. arts. 64. 01-.05. In Donald Ray Cravin v. State, No. 01-01-01166-CR, 2002 Tex. Crim. App. LEXIS 8494 (Texas Ct. App. Nov. 27, 2002), Cravin, who had been convicted in 1971 of sexual assault and sentenced to life imprisonment, filed a petition requesting a DNA analysis of his own clothing, the clothing of the victim, and certain medical evidence. The prosecution filed affidavits stating that the evidence Cravin sought to be tested could not be found. The trial court summarily dismissed the petition without a hearing. In his appeal, Cravin contended that he was denied due process because there was no evidentiary hearing and no opportunity to confront or cross-examine the affiants. Citing Rivera v. State, 89 S.W.3d 55 (Tex. Crim. App. 2002), the Texas Court of Appeals ruled that neither the statute nor constitutional due process required a hearing:

> The Texas legislature created Chapter 64 as a new procedure by which a convicted person could, under certain circumstances, have a new analysis or re-analysis of DNA evidence in his case. In doing so, the legislature set out very specific steps to be followed. The legislature clearly expressed its desire to allow court-ordered DNA testing under strictly limited circumstances.

Cravin, 2002 Tex. Crim. App. LEXIS 8494, at *6.

In interpreting their statute, the Texas Court of Appeals determined that the obligation of the state in responding to the petition was to either deliver the evidence or to explain why it could not do so. Id. No evidentiary hearing was required when the petitioner either failed to meet the statutory prerequisites or the state satisfactorily explained in writing that the evidence was unavailable. Id. at **6-7. The court also found that the petitioner was not entitled to be present under the confrontation clause and not entitled to the opportunity to cross-examine any witnesses. Id. at *9. As indicated, the court concluded that the procedure was not fundamentally unfair in violation of the due process clause. Id. at *11.

Tennessee Code Annotated section 40-30-409 contemplates a summary dismissal under appropriate circumstances. Here, the trial court implicitly concluded that evidence upon which DNA analysis could be conducted was no longer available. The failure to meet any of the qualifying criteria is, of course, fatal to the action. The affidavit filed by the state addressed the records of the law enforcement agencies, the prosecution, and the trial court clerk but did not address any possible evidence held by the clerk of this court. The records of this court do not include any specimen that could be subjected to DNA analysis. See State ex rel. Williamson v. Bomar, 213 Tenn. 449, 376 S.W.2d 451, 453 (1964) (this court may take judicial notice of its own records). Thus, all potential sources for the specimen have been exhausted.

In an effort to provide some guidance in proceedings such as this, this court has concluded that if the contents of a petition establish a prima facie case and, after any response by the state, the trial court determines all statutory prerequisites are present, a petitioner convicted of one of the statutorily enumerated crimes is entitled to DNA analysis. See Tenn. Code Ann. § 40-30-404. If the state contests the presence of any qualifying criteria and it is apparent that each prerequisite cannot be established, the trial court has the authority to dismiss the petition. Considerable latitude must be given to trial courts in gathering the necessary information for the decision. See Tenn. Code Ann. § 40-30-411 ("The court may in its discretion make such other orders as may be appropriate.).

Because the trial court here made a conscientious effort to determine the existence of the statutory conditions and had substantial facts upon which to determine that the biological specimens were no longer available, a summary dismissal was appropriate. All four qualifying criteria were not present. Further, because the appointment of counsel is discretionary under the statute, whether to substitute counsel was also discretionary. In the post-conviction setting, there is no entitlement to the effective assistance of counsel. House v. State, 911 S.W.2d 705, 712 (Tenn. 1995). That counsel advised the petitioner under these circumstances that relief was not likely warranted would not, in our view, be a proper basis for discharge or substitution. Finally, because the DNA Analysis Act did not become effective until August 1, 2001, some 20 years after the convictions at issue, the rationale of our supreme court in Ferguson as to the pre-trial obligation of the prosecution to preserve evidence, would not apply.

Accordingly, the judgment is affirmed.

_____

GARY R. WADE, PRESIDING JUDGE